FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PALEPALE ULUAKI FUA FINAU,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE; JOHN ASHCROFT,*
Attorney General, United States Department of Justice.
Respondents.

No. 00-70238

BIA No. A-41-812-646

OPINION

On Petition for Review of a Decision of the Board of Immigration Appeals

Argued and Submitted
July 12, 2001--San Francisco, California

Filed October 31, 2001

Before: William C. Canby, Jr., Michael Daly Hawkins, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Hawkins

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*John Ashcroft is substituted for his predecessor, Janet Reno, as Attorney General for the United States Department of Justice. Fed. R. App. P. 43(c)(2).

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COUNSEL

Dominic E. Capeci, Law Office of Dominic E. Capeci, San Francisco, California, for the petitioner.

A. Ashley Tabaddor, Office of Immigration Litigation, Civil Division, Department of Justice, Washington, D.C., for the respondents.

OPINION

HAWKINS, Circuit Judge:

Petitioner Palepale Uluaki Fua Finau ("Finau") contends that 8 U.S.C. § 1182(h) violates the Equal Protection Clause of the Fifth Amendment because it provides discretionary relief to otherwise-barred aliens seeking entry or adjustment of status, but does not afford such relief to removable lawful permanent residents of the United States. We disagree with the contention and deny the petition.

FACTS AND PROCEDURAL HISTORY

Finau, a native Tongan, has lived in the United States as a lawful permanent resident since 1988. In 1989 and 1992, he was convicted in California state court of petty theft. These two convictions rendered him removable under 8 U.S.C. § 1227(a)(2)(A)(ii), which provides for removal of lawful permanent residents convicted of two or more crimes involving moral turpitude which do not arise out of a single scheme of criminal misconduct. In 1998, Finau was served with a Notice to Appear and placed in removal proceedings.

The immigration judge ("IJ") ordered Finau's removal, which Finau appealed to the Board of Immigration Appeals ("BIA"), claiming eligiblity for voluntary departure and for a waiver under 8 U.S.C. § 1182(h).**1** The BIA sustained Finau's voluntary departure claim and remanded, noting that Finau should be given an opportunity to apply for the Section 1182(h) waiver.

On remand, the IJ found Finau was statutorily ineligible for relief under Section 1182(h) because he was a removable lawful permanent resident. The IJ noted she did not have jurisdiction over Finau's argument that the Equal Protection Clause required that lawful permanent residents be given the benefit of Section 1182(h). Finau appealed the decision to the BIA

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1 Section 1182(h) provides for discretionary admission of certain otherwise inadmissible aliens if:

> (1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that --
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> (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
>
> (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
>
> (iii) the alien has been rehabilitated; or
>
> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son or daughter of such alien . . . .

8 U.S.C. § 1182(h)(1998).

again, which affirmed the IJ and rejected the Equal Protection claim. Finau then appealed to this court.**2**

STANDARD OF REVIEW

We review the constitutionality of a statute de novo. Confederated Tribes of Siletz Indians v. United States , 110 F.3d 688, 693 (9th Cir. 1997).

DISCUSSION

I. Section 1182(h)

Section 1182(h) provides discretionary relief for aliens seeking to enter the United States who would ordinarily be statutorily excluded for a reason such as criminal history. Because an adjustment of status to that of lawful permanent resident is viewed as an "entry" into the United States, this relief also extends to aliens who are physically present in the country (such as aliens with visas and illegal aliens) who are seeking to become lawful permanent residents. See 8 U.S.C. §§ 1255; 1182(h)(2).

Discretionary relief is available in two circumstances. Aliens who would be statutorily inadmissible or not entitled to adjustment of status may obtain discretionary relief if the triggering crime is sufficiently remote and the alien has been rehabilitated. 8 U.S.C. § 1182(h)(1)(A)(i)-(iii). Alternatively, relief may be available if the alien has significant familial ties to United States citizens or lawful permanent residents and

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2 An earlier panel dismissed Finau's petition for lack of jurisdiction on the basis of 8 U.S.C. § 1252(a)(2)(C). The INS, however, concedes that this was an improper ground for dismissal. The prior panel granted Finau's petition for rehearing, and the case was ultimately reassigned to this panel. Although this court generally lacks jurisdiction to review a decision of the Attorney General to grant or deny a waiver under Section 1182(h), the INS concedes that we do have authority to entertain Finau's purely constitutional challenge to the statute. See also 8 U.S.C. § 1252(b)(9).

denial of admission would result in "extreme hardship" for the alien's family. 8 U.S.C. § 1182(h)(1)(B). Relief is available so long as the Attorney General "in his discretion . . . has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status." 8 U.S.C. § 1182(h)(2).

II. Equal Protection

Finau contends that Section 1182(h) violates the Equal Protection Clause of the Fifth Amendment by making the discretionary relief available to aliens seeking admission or adjustment of status, but not to those who are already lawful permanent residents seeking relief from removal. Aliens are entitled to the benefits of the Equal Protection Clause. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). The first question is whether removable lawful permanent residents are being treated differently from similarly situated classes. Abboud v. INS, 140 F.3d 843, 848 (9th Cir. 1998). If so, we must then consider whether there is a rational basis for the difference in treatment. Id.

Finau appears to ask us to consider essentially all aliens to be similarly situated, whether inadmissible or removable, lawfully or unlawfully admitted to the United States, or still outside the United States seeking entry. Specifically, he argues that removable lawful permanent residents are similarly situated to inadmissible aliens seeking entry or aliens present within the United States seeking but ineligible for adjustment of status. We are unpersuaded. To consider all such aliens similarly situated, we would have to ignore long-standing and fundamental distinctions between excludable and deportable aliens, as well as ignore the fundamental attributes of being a "lawful permanent resident," as opposed to another type of alien. See, e.g., Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210-212 (1953) (exclusion versus deportation); Paointhara v. INS, 708 F.2d 472, 473 (9th Cir. 1983) (lawful permanent residents versus other aliens).

[5] Finau seeks to compare himself to classes not lawfully admitted to the United States. As "outside" aliens, they are eligible for discretionary relief only at entry. On the contrary, lawful permanent residents such as Finau have already gained formal entry to the United States. Therefore, for purposes of Section 1182(h), we do not find removable lawful permanent residents to be similarly situated with aliens seeking entry to the United States, be it from abroad or through an adjustment of status.**3** Cf. Abboud, 140 F.3d at 848 (alien with both pending relative petition and application for permanent residence not similarly situated to alien with only pending relative petition).

CONCLUSION

The Equal Protection Clause requires only that similarly situated persons be treated alike. Id. Because we do not find removable lawful permanent residents to be similarly situated with otherwise-inadmissible aliens seeking entry to the United States, Section 1182(h) does not offend Equal Protection principles.

PETITION DENIED.

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3 Finau does make a credible argument that under Section 1182(h) he is treated differently from even other lawful permanent residents, i.e., inadmissible former lawful permanent residents who have left the country and are seeking readmission. It is not altogether clear, however, that Section 1182(h) would permit a discretionary waiver to an otherwise inadmissible lawful permanent resident. See United States v. Estrada-Torres, 179 F.3d 776, 778-79 (9th Cir. 1999) (reading "deportable " in former version of Section 1182(c) to include both deportable and excludable lawful permanent residents). Even if we accept Finau's reading and assume that he is similarly situated to lawful permanent residents seeking reentry, however, his equal protection claim still fails because the INS has advanced a rational explanation for the difference in treatment between inadmissible and removable lawful permanent residents: By requiring removable lawful permanent residents to voluntarily leave the United States first in order to be eligible for discretionary relief, the statute serves the purpose of getting unwanted and perhaps dangerous aliens out of the country quickly and voluntarily, and at a lower cost than that of full-blown removal proceedings. DeSousa v. Reno, 190 F.3d 175, 185 (3d Cir. 1999).